National Report for the Netherlands 'Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)'

van der Sangen, G.J.H.

Publication date:
2010

Document Version
Peer reviewed version

National Report for the Netherlands
'Study on the implementation of the Regulation 1435/2003
on the Statute for European Cooperative Society (SCE)'

Dr Ger J.H. van der Sangen
Tilburg University
Department Business Law

Introduction

The Netherland has a long tradition in the development of highly competitive cooperatives in several areas of industry like dairy, potato and meat processing and agricultural service cooperatives and retail banking, as well as insurance. Cooperatives are also used for housing in condominium, health care and educational organizations. The current number of cooperatives in the Netherlands is declining vis-à-vis non-cooperative business forms. However, agricultural cooperatives and banking cooperatives show a stable increase in turnover and growth of the company. Over the past decades there has been a constant decline in the number of cooperatives registered in the commercial register. One reason for it is that the Netherlands cooperative sector has evidenced a strong tendency towards concentrations and mergers. With regard to the agricultural sector, this is accompanied by a decline of the number of individual members, due to similar processes of concentrations and mergers of agricultural firms. On 7 April 2010, 4771 cooperatives have been registered in the Netherlands with the commercial register. However, a large number of these cooperatives, approximately 4000 are used for small firms or as special purposes vehicles. It concerns cooperatives with an ordinary and basic structure with an complete exemption of membership liability. The top 10 of agricultural cooperatives added with the Rabobank Group accounts for majority of turnover and employees employed. These latter organizations are organized through the National Cooperative Council (NCR) in the Netherlands.

According to the findings of a research into the database of the National Chamber of Commerce, combining all available data of the commercial registers in the Netherlands on cooperatives and SCEs, at this moment (26.04.2010) only one SCE has been registered at a commercial register in the Netherlands. Although SCEs according to Netherlands law are established by a notarial deed, SCEs have to register at a commercial register in order to obtain legal personality. Since only one SCE has been established according to Netherlands law, the SCE as a new business form therefore appears to be no success in the Netherlands until this moment.

1. The implementation of the SCE Regulation 1435/2003 in national legislation

1.1. Source, time and modes of implementation

The Council Regulation on the Statute for a European Cooperative Society (SCE) has been implemented in the Netherlands by the Act of 14 September 2006, Staatsblad 2006, 425, becoming into force on 13 October 2006 by Royal Decree (Staatsblad 2006, 456). As an appendix, enclosed are the Netherlands text of the bill and a literal translation of the act

implementing the SCE Regulation in English. This act (hereinafter: the Implementation Act) contains a mere 26 Articles, 21 one of them providing material rules on the 'Netherlands' SCE.

With regard to the position of employees, the Netherlands legislator choose not to pass a separate law on the matter in order to implement the directive on employee involvement in SCEs, but inserted the necessary provisions in the act implementing the SE-Directive of employee involvement. Enclosed is the Act Implementing Directive 2003/72/EC of 22 July 2003, OJ L207, leading to amendments of the Netherlands Act on the Involvement of employees in European Legal Persons ('Wet rol werknemers bij Europese rechtspersonen) (Staatsblad 2006, 361). This Netherlands act was initially passed to implement the SE-Directive on employee involvement. After the introduction of the SCE and the need for implementation of the SCE-Directive on employee involvement, the provisions related to the SCE ware inserted into this act, in chapter 2. The act implementing the SCE-Directive was passed on 17 March 2005 and became in force 18 August 2006 by Royal Decree (Staatsblad 2006, 362). This act generally follows the technique and procedures used for implementing the SE-Directive on employee involvement (consultation and information rights, the establishment of an SCE-Works Council and rules for preventing loss of pre-existing co-determination rights in case of the formation of an SCE). At this moment, there is no translation in English available for this highly technical and detailed part of the Netherlands SCE-legislation. Enclosed is the full text in Netherlands language.

1.2. Structure and main contents of the regulation

In the Implementation Act, the Netherlands legislator confined itself to implement the SCE Regulation as far as necessary. The provisions of the Implementation Act are rather concise. As a general rule, the Netherlands legislator refrained from additional lawmaking.

1.2.1. Mandatory implementation

Article 4 SCE-Re. with regard to considerations in kind has not lead to further implementation measurements.

With regard to article 7, paragraph 8 SCE-Re., Article 20 of the Implementation Act attributes the authority to issue a certificate to a notary registered in the Netherlands. This is in compliance with the Third Council Directive 78/855/EEC.

With regard to the registration and disclosure requirements referred to in article 11 of the SCE-Re., these requirements have been implemented in article 7 of the Implementation Act, designating the commercial register as the competent authority. The SCE is treated in this respect as a public company. Necessary amendments have been made in the Netherlands Act on the Commercial Register, providing for the obligation for the incorporators to register an SCE into the commercial register. Apart from this, establishing an SCE does not require additional registration or disclosure, save for those that would be involved in banking or insurance activities as mandated by the Netherlands Act on Financial Supervision. These cooperatives are placed under public oversight by DNB (banking supervisor) and the AFM (financial markets supervisor).

With regard to the independent expert for the merger, article 26 of SCE-Re. has not been implemented with any special provision. On the basis of article 4, paragraph 6 of the SCE-Re.

and art. 22, paragraph 1, section b, the auditor monitors the exchange ratio. It is understood that the same rules and procedures applie as in the case of a legal merger (see Van Veen et.al. 2006, p. 167).

With regard to article 29, paragraph 2 and art. 30, paragraph 1 SCE-Re., article 20 of the Implementation Act attributes the authority to issue a certificate to a notary registered in the Netherlands.

With regard to article 35 SCE-Re. on the procedure for formation by conversion, an certified auditor monitors the exchange ratio and verifies whether the total assets and liabilities equal the shares attributed after the merger on the basis of article 10 of the Implementation Act.

With regard to article 70 SCE-Re., the Netherlands Implementation Act does not contain any additional provisions. It is understood that the rules of national cooperatives are applicable on SCEs established in the Netherlands, and therefore auditing rules are applicable on SCEs on the same footing as on national cooperatives on the basis of article 360, Second Book, Netherlands Civil Code.

The provision of art. 73, paragraph 1 SCE-Re. has been implemented in article 16 of the Implementation Act, reading: 'In the cases referred to in article 73, paragraph 1, of the Regulation, a European Cooperative Society with registered office in the Netherlands will be dissolved by the court on application of any person with a legitimate interest or of the public prosecution service. Before declaring the dissolution, the court may allow the company time to rectify the situation within a specific timeframe set by the court.'

The provision of article 73, paragraph 2-6 has been implemented in article 17 of the Implementation Act, reading: 'A European Cooperative Society with statutory seat in the Netherlands will be dissolved by the court on the request of the public prosecution service, in case the central place of administration is not seated in the Netherlands. Before proclaiming the dissolution, the court may grant the European Cooperative Society the opportunity within a timeframe set by the court to transfer the central place of administration towards the Netherlands or to transfer its statutory seat in accordance with article 7 of the Regulation.'

The provision of article 76, paragraph 5 SCE-Re. has been implemented in article 19 of the Implementation Act, reading: 'The European Cooperative Society with registered office in the Netherlands that has drawn up a proposal of conversion into a cooperative in accordance with article 76 of the Regulation, submits the proposal at the office of the commercial register and announces the submission in a national gazette. An auditor referred to in article 393, paragraph 1, of the Second Book of the Civil Code shall certify, before the general meeting is held, that the European Cooperative Society to be converted into a cooperative has assets at least equivalent to its capital.'

With regard to article 78, paragraph 1 SCE-Re. ('member states shall make such provisions as is appropriate to ensure the effective application of this Regulation), the Netherlands legislator refrained from any additional legislative measures or policy to foster or promote the application of this Regulation in practice.

With regard to article 78, paragraph 2 SCE-Re.: see section 1.3.

1.2.2. Facultative implementation

Below will be indicated which optional provisions have been made in the Implementation Act.

The option of article 2, paragraph 2, has been implemented in article 2 Implementation Act.

The option of article 7, paragraph 14, has been implemented in article 6 Implementation Act.

The option of article 14, paragraph 1, has been implemented in article 8 Implementation Act. The Netherlands legislation on cooperatives already contained such a possibility in article 38, paragraph 2, Second Book, NCC. However, the adjudication of voting rights to non-using members for the cooperative is more flexible, e.g. restricted to one half of the total amount of the voting rights actually casts by members in the general meeting, while in case of the SCE it is restricted to a quarter of the total amount of the voting rights.

1.2.3. Scope of activities

The Implementation Act does not contain any restriction of the SCE with regard to the scope of their business activities. However, the SCE is viewed – although it follows the internal structure of a company with share capital – as an cooperative. The restrictions with regard to the nature of business activities applicable to cooperatives apply equally to SCEs in the Netherlands. An SCE is not allowed to pursue insurance activities. It is however disputable whether according to Netherlands law cooperatives and SCEs may pursue insurance activities through a fully owned subsidiary. We refer to section 3.2. and 3.3. for a description and analysis on this matter with regard to the Netherlands cooperative.

1.3. Designated authorities

As provided for by article 78, paragraph 2 SCE-Re., the following competent authorities were designated in the Netherlands:

- With regard to article 7, paragraph 2, articles 29, paragraph 2, article 30, paragraph 1 SCE-Re.: the notary. See article 20 Implementation Act.
- With regard to article 21 SCE-Re.: the Minister of Justice. See article 9 Implementation Act.
- With regard to article 54, paragraph 2 SCE-Re.: no additional designation has been made.
- With regard to article 73, paragraph 5 SCE-Re..: the head of the office of the Court of Appeal (ressortsparket) in Amsterdam. See article 21 Implementation Act.

1.4. Essential bibliography (in alphabetic order)

P.J. Dortmond, 'De uitvoeringswet verordening Europese coöperatieve vennootschap (SCE)', *Ondernemingsrecht* 2006-2, p. 44 e.v.
Title: 'The implementation act Regulation European Cooperative Society (SCE)' – no English version available.

R.C.J. Galle, 'De Societas Cooperativa Europea (SCE)', *Tijdschrift voor Ondernemingsbestuur* 2006-1, p. 13 e.v.
Title: 'The Societas Cooperativa Europea (SCE)' – no English version available.

R.C.J. Galle, 'The Societas Cooperativa Europea (SCE) and National Cooperatives in Comparative Perspective', *European Company Law*, December 2006, Vol. 3, Issue 6, p. 255-260.

R.C.J. Galle, 'De Societas Cooperative Europea (SCE) en nationale coöperaties in vergelijkend perspectief', in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever, Den Haag, 2007, p. 49-62
Title: this title is the Dutch version of the previous English title.

E.D.F. Kiersch & G.M. ter Huurne, 'De Europese coöperatieve vennootschap (SCE)', *Ondernemingsrecht* 2005-10, p. 346 e.v.
Title: 'The European Cooperative Society (SCE)' – no English version available.

G.J.H. van der Sangen, 'Grensoverschrijdende reorganisaties van coöperaties', in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever, Den Haag, 2007, p. 63-84.
Title Chapter: 'Cross-border reorganizations of cooperatives' in Title Book: *The cooperative, a contemporary business form* – no English version available

W.J.M. van Veen (red.), *De Europese Coöperatieve vennootschap (SCE)*, Serie Recht en Praktijk, deel 147, Deventer, Kluwer, 2006
Title: *The European Cooperative Society (SCE)* – no English version available.

2. Comment on the implementation of the SCE Regulation in the Netherlands

First of all, it is worth mentioning that although the SCE Regulation seems very clear on the issue in article 78, paragraph 1, the Netherlands legislator did not take any measures at national or regional level to support proactively the use in practice of either national cooperatives or the SCE as a business form. From the legislative historical accounts on the implementation of the SCE follows that the Netherlands' legislator merely confined itself to implement the SCE Regulation and the Directives on the involvement of employees as far as necessary. No additional measures fostering and promoting cooperatives and SCEs came to my knowledge. In the literature, article 78, paragraph 1 SCE-re. was not covered by any comment.

From the survey (questionnaire 2) conducted, we have only the experience of the Cassia-Coop SCE, established on 14 December 2009 in Amsterdam. The main reasons for the incorporators of Cassia-Coop SCE to choose for the SCE were: 1) to benefit from the value of the European image and to use the European flag for this international cooperative chain of producers and suppliers and importers of exotic spices, and 2) the possibility to pay dividends to members in proportion to their business with the SCE or the services they have performed, which was the basic idea of the cooperative's business plan. However, the latter concept could also have been configured through a cooperative as well.

All interviews answered affirmative to the question whether they knew the purpose of the SCE Regulation and they were aware of the existence of the SCE Statute. Although the number of interviewees returning the filled-in questionnaire is rather small, they share the same overall opinion. According to the interviewees, the SCE is not commonly used because practitioners agree that the Netherlands regulation of the cooperative is more flexible. In this respect, almost all interviewees refer to the complexity of the SCE Regulation as well as the complexity of the rules for employee involvement. The absence of a specific tax regime is also mentioned by several interviewees: the SCE is treated as a public company concerning taxation and not as a cooperative, depriving the SCE from tax facilities for cooperatives. The special tax regime for cooperatives (see section 3.10) – though restrictive in its nature – is not applicable on the SCE.

A second reason that the SCE is not being used in practice may be based on the dichotomy between the national cooperative which follows the organizational structure of an association, which is relatively flexible, while the SCE follows a hybrid organizational structure of an association with components of a company with share capital.

Another reason reported was the fact that the SCE is governed by different layers of legislation and provisions in the articles of association. Combined with the complex rules for employee involvement, stemming from the Directive, the complexity and the references back and forth makes the SCE as business form inaccessible for practitioners vis-à-vis the well-known and flexible legal structure of the cooperative.

The benefits of the SCE would be mainly to facilitate cross-border legal mergers, seat transfers and cross-border cooperation with other cooperatives and/or SCEs from other member states. With regard to the facility of cross-border legal mergers, it seems that the demand for this facility is absent, in particular because the Regulation forces cooperatives wishing to merge, to form an SCE. Note that in the Netherlands the implemented 10th Directive does not provide for facilities for cross-border legal merges between a Netherlands cooperative and a cooperative from another member state. However, a Netherlands cooperative may act as an acquiring company in a cross-border legal mergers on the basis of the European Court of Justice Sevic-decision.

In summary, the 'failure' of the SCE in the Netherlands is caused by the complexity of the SCE Regulation, the implementation measures, the mandatory and complex rules for employee involvement and the absence of a specific tax regime. Combined, its makes the SCE impractical, whereas – at the same time – it is not self-evident what the specific benefits of the SCE are in practice, while the national cooperative is considered to be very flexible.

3. Overview of cooperative law

3.1. Sources and legislation features in the Netherlands

In the Netherlands, apart from 'cooperative' insurance companies (mutual companies), there are no specific regimes for different types of cooperatives.

The primary source of legislation with regard to cooperatives is the Second Book of the Netherlands Civil Code on Legal Persons. However, there is no section in the code containing all the provisions with regard to the cooperative. The Second Book of the Netherlands Civil Code (NCC) contains provisions on legal persons in general. Several sections of this part of the Civil Code are relevant to cooperatives. Articles and provisions relevant to the cooperative as being a legal person in the meaning of the Second Book of the NCC can be found in Title 1, under the heading *General Provisions*. These provisions apply to all legal persons enunciated in article 3 NCC. In these General Provisions, you may find

provisions with regard to the nullity of legal persons, rules on 'ultra vires'-transactions, the attribution of legal personality and legal standing in proceeding, provisions on the procedure and annulment of resolutions of its bodies, the grounds and procedures for liquidation and winding-up, as well as some definitions related to corporate groups.

Title 2, under the heading *Associations*, contains provisions with regard to associations in general. This title according to article 53a of the NCC – save for article 26, paragraph 3 and article 44, paragraph 2 – applies to cooperatives as well as, unless Title 3 on cooperatives and mutual insurance companies provides otherwise. However, Title 3 has been composed by the legislator into two sections: the first on general provisions for all cooperatives (not being SCEs) and mutual insurance companies and the second for cooperatives and mutual insurance companies that have to apply a statutory two-tier regime providing for a mandatory supervisory board with mandatory, though low-level co-determination rights for employees.

In Title 4 on private companies limited by shares, there are some specific provisions on the conversion of cooperatives into private companies limited by shares and vice versa (articles 71/181 and articles 72/183). Then, Title 7 contains general provisions on domestic legal mergers that apply also to legal mergers between cooperatives and between cooperatives and other legal persons (not being SCEs). Its worth mentioning that the Second Book of the NCC does not contain any provision for cooperatives to engage in a cross-border legal merger, save for the provisions envisaged in the European Cooperative Society Regulation and the Netherlands implementation act thereof. Note however that cooperatives without having to establish an SCE may engage in a cross-border legal merger with cooperatives from other member states on the basis of the European Court of Justice-decisions in the SEVIC-case (Van der Sangen, Dortmond & Galle 2007, p. 77 en Van Veen et. al. (eds.) 2006, p. 6). In Title 7, section 4 we find general provisions on legal splits (decision), that also apply to cooperatives. In Title 8, section 2, we find the inquiry procedure of the Enterprise Chamber of the Amsterdam Court of Appeal, that applies to cooperatives as well, providing members of the cooperative, trade unions and the public prosecutor the opportunity to request an inquiry into the affairs of the cooperative and into the way the board has conducted its affairs. Finally, Title 9 contains general provisions applicable on cooperatives with regard to annual accounts and consolidated annual accounts and the obligation to disclose them.

In summary, the part most relevant to cooperatives in the Second Book of the NCC can be found in the articles 53 up to 63j and, by way of analogy, in the articles 26-52 on associations in general (save for articles 26, paragraph 3 and 44, paragraph 2). Enclosed are the Netherlands text of the NCC relevant to cooperatives as well as the translation in English (Kluwer, Legal Persons, loose leaf edition, Deventer).

Evaluating the current legislation for cooperatives, in general the Netherlands law on cooperatives and associations has been regarded by practitioners as very flexible with regard to setting up a cooperative and tailoring the cooperative's articles of association to the needs of the incorporators. In this respect, it is essential to point out that according to Netherlands law cooperatives are under no obligation to adhere to additional social or civil society principles, nor under any obligation to associate potential new members unless the articles of association stipulate otherwise.

However, cooperatives in general are treated for the purpose of taxation at the same footing as private companies limited by shares. The facilities for corporate tax reduction for payments to patrons/members are regarded as being too stringent (see section 3.10.). The same is true in respect to the application of anti-trust law. Cooperatives generally are not granted a preferential treatment vis-à-vis investor-owned firms in this respect.

As indicated above, the use of the cooperative as a business form is widespread in several areas of the agricultural industry, commonly as the parent company. It is allowed in

the Netherlands that a cooperative functions as a holding company while the actual business groups and units are organized in private companies under full control of a sub holding. On rare occasions, the cooperative is used for consumer retail activities (C1000) and as a business form for employee-owned firms. The cooperative has been widely used to organize full service banking activities side to side with investor-owned firms, for the example through the Rabobank Group organization, a cooperative of local cooperative banks. It is worth mentioning that the cooperative recently has been used on a regular basis as a tool for tax planning by law and accounting firms as well as private equity firms, on account of the fact that cooperatives are not submitted to taxation on the distribution of profits. So, in these cases the cooperative is merely used as a special purpose vehicle within the legal boundaries of Netherlands law on cooperatives and associations (Van der Bijl 2010).

3.2. Definition and aim of cooperatives in the Netherlands

Pursuant to article 53, paragraph 1, Second Book, NCC a cooperative is an association established as a cooperative by a notarial deed. Under its articles of association, its statutory objective must be to provide for certain material needs of its members under agreements, other than insurance agreements, concluded with them in the business it conducts or causes to be conducted to that end for the benefit of its members. In this respect, it is important to point out that according to Netherlands law save for the restriction on insurance activities, a cooperative can take up all kind of business activities that the members wish the cooperative to perform, as long as it entails economic transactions with the members that ultimately benefit its members. It is irrelevant how the cooperative benefits the economic interests of its members, either through restitutions or additional payments on transactions or through the distribution of annual profits. The cooperative is allowed to function as a holding company, provided that the economic interaction with its members will be executed by one of its designated subsidiaries.

According to article 53, paragraph 3 and 4, Second Book, NCC, a cooperative may expand its business to non-members on the same footing as members provided that the articles of association explicitly facilitate this option and the total amount of economic interaction with members does not become of subordinate importance. The cooperative is allowed to pursue other non-economic interests as well as in so far the articles of associations do not preclude it and the pursue of non-economic interests is linked with the statutory economic objective of the cooperative.

3.3. Activity

According to the abovementioned legal definition, a cooperative has to benefit the economic interests of its members by engaging into transactions with them other than insurance contracts. For this objective, the mutual company or the public company is the mandatory legal business form. There are no restrictions in the law on cooperatives with regard to the scope of activities. Of course, cooperatives like any other company may be subject to specific regulations, like regulations on the supervision of financial institutions.

As described above, a cooperative may expend its business to non-members on the same footing as members provided that the articles of association explicitly facilitate this option and the total amount of economic interaction with members does not become of subordinate importance. The cooperative is allowed to pursue other non-economic interests as well in so far the articles of associations do not preclude it and the pursue of non-economic interests is linked with the statutory economic objective of the cooperative.

3.4. Forms and modes of setting up

Cooperatives are formed either ex novo through the establishment of a new legal person or through a legal merger between two or more already existing cooperatives or through the conversion of an already existing legal person into a cooperative. In practice, the first option is commonly used.

The establishment of a new cooperative requires a minimum of two incorporators, being the first members of the cooperative. Although some legal scholars (Van der Sangen, Dortmond & Galle 2007, p. 5) argue that a cooperative with one single membership does not fall within the scope of the legal definition of the cooperative, the Netherlands law allows a cooperative to exist as a legal person in case only one single member remains. In case no members remains, the cooperative will be dissolved (see article 19, paragraph 1, Second Book, NCC). According to Netherlands law on cooperatives, the creation of a single membership cooperative therefore is not prohibited. Furthermore, the cooperative is under no obligation to associate other potential members unless the articles of associations indicate so. It is for this reason and for tax purposes that the single member cooperative is used as an alternative to private companies in order to obtain the benefits of limited liability by small and entity shielding by small firms and service providers and as a special purpose vehicle in (international) financial and investments arrangements induced by private equity funds.

A new cooperative may also be established through a legal merger. However, according to the current regulations on domestic legal mergers in the Netherlands, only pre-existing cooperatives have to opportunity to merge into a new cooperative. Other legal persons wishing to merge with a cooperative need to be converted into a cooperative prior to the legal merger (articles 310, Second Book, NCC).

3.5. Membership

As indicated under 3.4., the Netherlands cooperative requires from its inception a minimum of two members. However, in case one member withdraws from his membership leaving the cooperative with one single membership, the mere fact that the cooperative has only one member left, does not lead to the dissolution of the cooperative.

Apart from specific requirements for membership in the articles of association, the law itself does not contain any membership requirements. Natural persons as well as legal persons are allowed to membership. Once a member, the member is not obliged to enter into transactions with the cooperative, save for an obligation to do so in the articles of association establishing an exclusive economic relationship. The articles of association may impose on members other obligations or requirements, like the obligation to participate in an equity funding arrangement or to pay an entrance fee (see articles 27, paragraph 4 and 34a, Second Book, NCC).

According to the general opinion in the literature as well as following from the provisions in the law on associations – which apply to cooperatives unless indicated otherwise – non-using members are allowed to be provided in the articles of association. Since the economic interaction with using members is the quintessence of the statutory objective of the cooperative, some scholars (Dortmond 1992 and Van der Sangen, Dortmond & Galle 2007) have pointed out that the introduction of non-using members, like investor members, should be regarded as an exceptional option, however without providing clear-cut thresholds. The legislator has solved this issue by providing that non-using members, although admissible,

can only be granted a limited number of voting rights, if any, according to articles of association. The total amount of voting rights of the non-using members in the general meeting has been mandatory restricted to one half of the total number of votes actually cast in the general meeting (see article 38, paragraph 2, Second Book, NCC).

As a general rule, the board decides on the admission of new members. In case of refusal, the candidate may address the general meeting to scrutinise the boards' decision. However, the articles of association may provide for another procedure (see article 33, Second Book, NCC). The law on cooperatives (and associations) contains no additional provisions on the admission of new members, leaving incorporators ample flexibility to provide for membership requirements.

3.6. Financial profiles

According to the system of cooperative regulation, it is assumed by the legislator that the cooperative will be funded by equity provided for by its members. Contrary to private companies limited by shares, members are under no obligation to participate in financial arrangements for raising equity unless the articles of association provide otherwise. Hence, there are no minimum capital requirements for the establishment of a cooperative. However, in case of insolvency or liquidation of the cooperative, the members are severely and jointly liable towards to receiver of the insolvent or liquidated cooperative to pay for the total deficit. This regime for statutory liability in case of liquidation may be set aside in the articles of association and be replaced by either a restricted liability to pay for the deficit or a complete exclusion of any kind of liability of the members. The restriction or exclusion of membership liability has to appear in the name of the cooperative in order to rely upon it vis-à-vis third parties. On the basis of the total number of cooperatives assessed on 7 April 2010, 4303 cooperative used a complete exclusion of liability, 309 used a limited liability and only 158 cooperatives used a statutory liability.

However, this legal system laid down in article 55 and 56, Second Book, NCC does not preclude cooperatives from the introduction of share capital to members. Nevertheless, since the purpose of the cooperative is to foster economic interests of its members through engaging with them into specific economic transactions, the issuance of share is commonly related to the (amount of) economic transactions between the cooperative and its members.

Although it is not prohibited in generic terms for cooperatives to issue financial instruments, the issuance of shares providing a return on capital invested by either members or third parties is assumed to be exceptional, according to general opinion in legal scholarship (Dortmond 1991, Galle 1993, Van der Sangen, 1999 en 2007 and Van der Bijl 2010).

Notably with regard to agricultural cooperatives, members are obliged in the articles of association not only to participate in equity funding – either through the retention of the net proceeds or through an obligation to participate in the issuance of shares related to the amount of the economic transaction with the cooperative, but also to participate in financing the cooperative through long-term loans. These long-term loans generally involve a repayment after a fixed period (e.g. 10 years) or after withdrawal. In case of insolvency or voluntary liquidation of the cooperative, members are not entitled to compensate their right to payment of the loan with their obligations to pay to the cooperative, therefore generating an additional guarantee for non-member creditors that their obligations will be met in case of insolvency of voluntary liquidation (see article 55, paragraph 5, Second Book, NCC and case law HR in the case Sol vs. Cebeco).

With regard to the distribution of profits/net proceeds, the regulation on cooperatives is rather flexible. On the basis of the law, members are not entitled to an annual payment of

their share in the net proceeds or profits, unless the articles of association provide otherwise. Article 27, paragraph 4, Second Book, NCC merely stipulates that the articles of association have to contain a provision on the allocation of profits *in case of liquidation*. The incorporators are free to provide for any form of profit allocation in the articles of association, including no provision or a provision that adds the profits to the general reserves of the cooperative.

A cooperative, like any other entrepreneurial firm, is under an obligation to compose an annual account and profit and loss account according to the standards set out in Titel 9, Second Book, NCC (article 360 and further) and under an obligation to disclosure these accounts through submission at the commercial registrar (article 394) within 2 months after approval of the accounts by the general meeting. Approval of the accounts by the general meeting is due within 6 months after closing of the financial book year, with a possibility of an extension with 5 months (article 58). The maximum timeframe for disclosing the annual accounts is 13 months after closing of the financial book year (article 394, paragraph 3). However, small and medium-sized companies are completely or partially exempted from these disclosure requirements (art. 396 and 397). Since cooperatives in practice function as a parent company or holding company, cooperatives may have to produce and disclose consolidated accounts on the basis of the 4th and 7th EC Company Law Directive, implemented in articles 405 and further of the Second Book, NCC.

Compulsory reserves of the cooperative are either statutory reserves mandated by law, like enunciated in detail in article 373, paragraph 4, Second Book, NCC or reserves provided for in the articles of association. In both cases, a cooperative is not allowed to distribute these reserves nor use them for the redemption of loses incurred by the cooperative (article 58, paragraph 4).

3.7. Organisational profiles

The Netherlands regulation on the internal structure and its corporate governance system is very flexible and contains only two statutory organs to be created in the articles of association: the general meeting of shareholders and the management organ (the board). Save for the statutory two-tier board regime for large cooperatives as laid down in articles 63a and further, Second Book, NCC, a supervisory organ is not imperative. In case a cooperative chooses not to have a separate supervisory organ, the cooperative will be obliged the have its annual financial accounts monitors either by a commission of two members not being members of the management organ or by a certified auditor (see article 58, paragraph 1, read in conjunction with article 48, paragraph 2, Second Book, NCC).

However, like mentioned above, large cooperatives within the meaning of article 63, paragraph 2 – having an equity of € 16 million, a total amount of 100 employees and a works council installed on the basis of its mandatory obligation from the Act on Works Councils – have to create after 3 years in their articles of association a mandatory supervisory organ with special powers, notably the power to veto board decisions on major transactions as described in article 63j, Second Book, NCC and the obligation to sign for the annual final accounts. Note that even in the case the statutory two-tier regime applies, board members are appointed and dismissed by the general meeting. Members of the supervisory organ in the statutory two-tier regime are appointed by the general meeting on the basis of a proposal by the supervisory organ. While making this proposal, the supervisory body needs to take into account recommendations by the general meeting and the works council. Please not that the statutory two-tier regime does not apply to the Netherlands SCE *ipso iure*, but may be applicable on an SCE on account of the outcome of the negotiation procedure with the special negotiation body

or the application of the before and after-principle in the Directive (Van Veen (eds.) et. al. 2006, p. 196).

Members of the management organ are appointed by the general meeting. However, the articles of association may allow for a different mode provided that members remain in the position to take part in the election of board members through an intermediate procedure. For example, its allowed in case a cooperative has a very large number of members that the members choose delegates and that these delegates act as the general meeting (see article 39, Second Book, NCC), that elects directly or through an intermediate procedure the members of the management organ. Its even allowed that the elected delegates, acting as the general meeting, elect the members of the supervisory organ, that subsequently elects the members of the management board (see Van der Sangen 1999 and Schreurs-Engelaar 1995).

With regard to the composition of the management organ of the cooperative, the Netherlands law is very flexible. Although members of this organ are appointed by members and candidates have to be members, the articles of associations may allow that board members are not members, but e.g. professional managers (see article 37, paragraph 1, Second Book, NCC). There are no restrictions in this respect. Secondly, it is allowed that less than half of the total number of board members will be appointed by non-members (see article 37, paragraph 3, Second Book, NCC). However, since the Netherlands law on cooperatives allows the cooperative to function as a holding company while the actual cooperative enterprise is run by a subsidiary, the appointment of professional management of the subsidiary poses no real obstacle from a legal point of view. If the cooperative is organized in this way, the management organ of the cooperative holding functions *de facto* as a supervisory body (see Van der Sangen, Dortmond & Galle 2007, p. 24).

Since there are no specific rules with regard to the appointment of an external auditor and save for provisions in the articles of association, the management organ selects the external auditor.

Article 38, Second Book, NCC contains an extensive regulation for voting rights in the general meeting. Although all members are entitled to vote on the basis of the ‘one share, one vote’-principle by way of a default rule, the articles of association may allow a differentiation of voting rights, e.g. related to the value or number of economic transactions for each individual member with the cooperative over a certain period of time (see article 38, paragraph 1, last sentence). Secondly, the articles of association may introduce voting rights for non-members. The voting rights of non-members is, however, restricted to one half of the total amount of votes actually cast by the members in the general. This provision, laid down in article 38, paragraph 3, may be used to adjudicate voting rights to non-member investors (Van der Sangen, 1999, Van der Sangen, Dortmond & Galle 2007, p. 168 as well as Dortmond 1992 and Galle 1993).

3.8. Registration and control

Under the rules for disclosure of corporate data, cooperatives are obliged to register the cooperative at the commercial register in conformity with the Act on Commercial Registers 2007 (Handelsregisterwet 2007). Specific requirements for disclosure as well as the company’s items to be disclosed are laid down in the Royal Decree on Commercial Registers 2007 (Handelsregisterbesluit). There is no specific register for cooperatives. Cooperatives – save for cooperatives involved in banking, financial and insurance activities – are not subject to public control or any form of external control.

3.9. Transformation and conversion

Cooperatives are allowed to transform themselves into a different legal business form under the general provision for all legal persons provided in article 18, Second Book, NCC. There are no restrictions for cooperatives with respect to the scope of the legal business forms to be transformed in, provided the legal person after transformation is either an association, mutual company, private company limited by shares or a foundation. A transformation entails no alteration or change of the legal personality (article 18, paragraph 8) and therefore does not entail any transfer of assets or liabilities.

Transformation of a cooperative requires a resolution of the general meeting with a majority of 9/10 of the total amount of votes casted at the meeting, a separate resolution of the general meeting to amend the articles of association and a deed of transformation by a notary, containing the amended articles of association.

In case of a transformation into a private company limited by shares, additional requirements have to be met, including:

- a declaration of the Minister of Justice that there are no objections to the transformation or the amendments of the articles of association;
- a affidavit of a certified auditor that the value of assets of the company five months before the transformation equals the total amount of shares paid for according to the notarial deed of transformation;
- the written permission of every single member who's shares will not be paid for at the time of the transformation out of the cooperatives pre-existing reserves (article 72/183, paragraph 2).

It is assumed that all members will become shareholders. However, transformation triggers the statutory right of members to withdraw from the cooperative, to be executed within one month after the resolution of the general meeting (article 72/183, paragraph 3, read in conjunction with article 36, paragraph 4, Second Book, NCC).

A cooperative may be *de facto* transformed into a private company limited by shares through a legal merger on the basis of article 310, paragraph 4, if the private company is the only member of the cooperative and acts as the disappearing company in the merger. A cooperative may be transformed into an SCE on the basis of article 35 SCE Re and article 10 Implementation Act. A cooperative may not be transformed into an SE. A cooperative may be transformed into a EEIG on the basis of article 8 of the Act Implementing the European Economic Interest Grouping Regulation.

3.10. Specific tax treatment

In principal, cooperatives are treated for the purpose of taxation at the same footing as private companies limited by shares and are subject to the Corporate Tax Act 1969 (article 2). This implies that cooperatives have access to the same tax facilities as corporations, but cooperatives and their members also suffer the same burden of taxation as corporations and its shareholders. However, in order to take into account the hybrid character of the cooperative as an incomplete vertical integration between the economic units of its members and the cooperative, the Netherlands legislator introduced a specific tax deduction regime for cooperatives in article 9, Corporate Tax Act 1969. However, the facilities for corporate tax deduction for payments to patrons/members are regarded as being too stringent by incorporators, hampering innovations in financing cooperatives with additional equity capital funded by members or external investors distinct from the economic interactions between

members and the cooperative. The Netherlands legislator ruled that the profits of a cooperative are deemed to be split in an independent profit – connected with non-cooperative activities – and a partially deductibility regime profit (PDR profit). However, cooperatives are only allowed to deduct the PDR profit, if four criteria simultaneously are met:

- the PDR profit must have been distributed immediately within one year after the book year in which the profits were gained;
- the PDR profits to be distributed is restricted to the amount of profits gained in one book year, meaning that prior reservations of profits are not considered to be tax deductible, if distributed in the following years;
- the PDR profits must be distributed to the members in proportion of the value of their economic transactions with the cooperative, and
- the PDR profits are only deductible if distributed to members that are natural persons; a number of five legal persons being members, however, will not be taken into account.

Another pivotal issue with regard to the tax burden of cooperatives issue is considered the issue of fixing or estimating the profits of a cooperative if the cooperative does not pay for the economic transactions with its members on the basis of market prices. Profits for taxation purposes have to be fixed on the basis of market prices which may render a problem if the cooperative is the only or one of the few entrepreneurs in the market.

Apart from the Corporate Tax Act, in the literature (Jansen 1996, Van der Geld en Van Weeghel in: Van der Sangen, Dortmond & Galle 2007, p. 85 and further and p. 99 and further respectively) questions were raised with regard to the question whether a cooperative paying dividends on capital invested would be subject to an obligation to pay dividend taxation according to the Dividend Taxation Act. This act, however, technically, only applies to companies with share capital. Cooperatives – at least that is the expressed and published opinion of the Minister of Finance – are not considered to be companies with share capital, meaning that cooperatives can distribute profits to investors without paying any taxes on dividends. This granted fiscal leeway accounts for the recent increase of the establishment of holding and sub holding cooperatives, notable in private equity financial arrangements (see on this issue Van der Bijl 2010).

3.11. Existing draft proposing new legislation, if any

At this moment, the Netherlands legislator is not contemplating any reform or revision of the regulations with regard to cooperatives. The cooperative movement, practitioners and legal scholars are of the general opinion that Netherlands cooperative law is very flexible leaving ample opportunity for incorporators to seek tailor-made adjustments to the cooperative legal statute.

The Netherlands legislator is currently in the process of reforming its regulation on private companies limited by shares, adding – amongst others – the possibility to insert in the articles of association of private companies additional obligations for shareholders next to their obligation to pay considerations on share capital. It is understood that this facility will create the opportunity for incorporators to establish a company on ‘cooperative’ principles by choosing the future business form of private company limited by shares. Please note that the Netherlands law does not mandate incorporators who want to establish a company based on cooperative principles to use the legal form of the cooperative.

3.12. Essential bibliography (in alphabetic order)

T. Ackermann, 'Joined Cases C-319-93, 40-94 & 224194, H.E. Dijkstra and Others v. Friesland (Frico Domo) Cooperatie', *Common market law review* (34) 1997, p. 695

Asser-Van der Grinten-Maeijer 2-II, C. Asser, *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Vertegenwoordiging en Rechtspersoon, De rechtspersoon*, 8e druk, bewerkt door J.M.M. Maeijer, Tjeenk Willink, Deventer, 1997
Title: Manual for practising Netherlands Civil Law, Representation and Legal Persons, The Legal Person – no English version available

P.C.S. van der Bijl, 'De coöperatie als houdstermaatschappij: houdstercoöperatie of concerncoöperatie', *Ondernemingsrecht* 2010-3, p. 130
Title: 'The cooperative as a holding company: holding cooperative or group cooperative' – no English version available.

P.J. Dortmond, (1991), *De coöperatie: van vereniging naar houdstermaatschappij en beursrechtspersoon*, inaugurele rede Katholieke Universiteit Nijmegen, Kluwer, Deventer 1991
Title: *The cooperative: from association to holding company and listed company* – no English version available.

M.E. Engelaar, *Organisatie en financiering van de coöperatie,* Ars Aequi Cahiers, Privaatrecht deel 9, Ars Aequi Libri, Nijmegen 2000
Title: *Organization and financing of the cooperative* – no English version available.

R.C.J. Galle, De coöperatie, W.E.J. Tjeenk Willink, Zwolle 1993
Title: *The cooperative* – summary available in English.

J.J.M. Jansen, *Belastingheffing van coöperaties en haar leden*, Kluwer, Deventer 1996
Title: *Taxation of cooperatives and its members* – summary available in English.

J.B.W.M. Kemperink 2006, *Vraagstukken rond (terug)storting op nv/bv-aandelen en van coöperatierecht*, IvO RUG, deel 53, Kluwer: Deventer 2006
Title: *Legal Issues with regard to (re)payments on share capital of private companies and with regard to cooperative law* – summary available in English.

T.J. van der Ploeg, H.C. Overes & W.J.M. van Veen, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij,* Kluwer, Deventer, 2007.
Title: *On associations and foundations, cooperatives and mutuals* – no English version available.

M.J.G.C. Raaijmakers, *Ondernemingsrecht*, Pitlo Deel 2, eerste druk, Kluwer: Deventer 2006
Title: *Company Law* – no English version available.

G.J.H. van der Sangen, *Rechtskarakter en financiering van de coöperatie*, W.E.J. Tjeenk Willink, Zwolle 1999.
Title: *Legal nature and financing of the cooperative* – summary available in English.

G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (red.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever, Den Haag, 2007
Title: *The cooperative, a contemporary legal form* – no English version available.

G.J.H. van der Sangen, *Titel 2 Boek BW. De coöperatie, Rechtspersonen, Losbladig Commentaar op Boek 2 BW*, Kluwer, Deventer, 2010
Title: *Title 2, Second Book, Civil Code. The cooperative, Legal Persons, Loose-leaf edition, Comment on the Second Book, Civil Code* – no English version available.

M.E. Schreurs-Engelaar, *Organen van de coöperatie*, Kluwer, Deventer 1995.
Title: *Organs of the cooperative* – summary available in English.

4. The SCE Regulation and national law on cooperatives

Although the Netherlands has an active and well-organized cooperative movement, the introduction of the European Cooperative Society did not lead to an intense debate on the merits of this new pan-European business form aiming at cross-border cooperation between cooperatives from different member states amongst practitioners and potential users from the cooperative movement. The same is true for the academic debate with regard to the introduction of the SCE vis-à-vis other business forms, notably the cooperative and private companies limited by shares, including the SE. Most academic publications confined themselves to comment on the regulation of the SCE as set out in the Regulation and the Directive on the involvement of employees. One publication (Dortmond 2006), however, actually encapsulated in the analyses the implementation act. Since only one SCE has been established in the Netherlands, until now there are no accounts in the literature on the experience with the SCE in practice. Contrary to the situation in Germany, in the Netherlands the introduction of the SCE did not have any harmonizing effect with regard to the regulation of the cooperative.

Comparing the SCE implemented in the Netherlands law with the cooperative, the SCE Statute contains several beneficial features that, theoretically, incorporators may take into account while contemplating to opt for the SCE or the cooperative. However, in order to create an SCE a legal person, it requires a cross-border element and therefore cannot be used by incorporators seeking a legal business form for their cooperative enterprise that intends to expand the cooperative enterprise cross-border in the future. The beneficial features are:

- contrary to the Netherlands law on cooperatives, the SCE can be established for a fixed period;
- contrary to the Netherlands law on cooperatives, the SCE is able to transfer its seat to another member state;
- contrary to the Netherlands law on cooperatives and legal mergers, the SCE Statute provides for cross-border legal mergers between cooperatives and/or SCEs from different member states;
- contrary to the statutory two-tier regime for ‘large’ cooperatives, the SCE Statute does not force the incorporators to apply this regime and provides the possibility to opt for a one-tier board.

However, these benefits do not outcompete the cooperative even in a cross-border setting because the benefits seem trivial compared to the flexibility of the cooperative and, secondly, the SCE Statute itself contains restrictive features the cooperative does not encounter.

With regard to the triviality of the benefits, its questionable whether in practice there is a need to transfer the seat of a Netherlands cooperative to another member state. More importantly, the SCE Statute mandates that the real seat and seat of incorporation coincide, meaning that the cooperative that wishes to form an SCE in order to transfer its seat has to transfer its real seat – the central place of administration or headquarters – as well.

Although the Netherlands law until now contains no specific provision on cross-border legal mergers for cooperative, cooperatives may enter into a cross-border legal merger on the basis of the European Court of Justice decision in the Sevic-case, applying national legal merger law in case the Netherlands cooperative is the acquiring company.

Although the statutory two-tier regime is not applicable on the SCE, for existing cooperatives from the Netherlands with a statutory two-tier regime, this may necessitate the creation of a two-tier board model with components of the statutory two-tier regime on account of the outcome of the procedure for the involvement of employees.

Besides the triviality of the benefits of the SCE Statute, the SCE Statute itself compared to the cooperative contains a large number of restrictive features:

- Although membership can be fixed for an extensive period of time as well the period for withdrawal, members of a SCE can withdraw from their membership immediately in the cases set out in article 15, paragraph 2, SCE-Re. According to articles 36, paragraph 3, Second Book, NCC this right of withdrawal can be excluded in the articles of association, a provision commonly used by cooperatives.
- The mandatory connection between the real seat and the seat of incorporation. Since the Netherlands adheres to the incorporation theory (article 2, Act on Conflict Law Corporations), there is no legal restriction in this respect for cooperatives, nor for accepting members from other member states.
- The hybrid character of the SCE between association and company with share capital, which is not commonly used in the Netherlands by cooperatives.
- The minimum capital requirement.
- The adjudication of voting rights to members, non-using members and non-members is more complex and more restrictive.
- The establishment of an SCE by already existing cooperatives with co-determination forces the cooperatives to enter into negotiations with representatives of employees or to apply the Standard Rules of the Directive.
- From a tax law point of view, the SCE is treated like a company with share capital and therefore having no access to tax facilities designed for cooperatives.

In short, the benefits of the SCE Statute are not self-evident, while the regulation of the Netherlands is very flexible. Compared to other legal business forms, the cooperative does not encounter any legal obstacle that may hamper their future development. However, as pointed out above in section 3.10, the tax facilities for cooperatives to deduct the PDR profit is considered to be too restrictive and hampers innovations in the field of equity raising by cooperatives.